No. 773.

In the Supreme Court of the United States

OCTOBER TERM, 1909

LYDA B. DORSEY, APPELLANT,

vs.

JAMES R. GARFIELD, SECRETARY OF THE INTERIOR, AND FRANCIS E. LEUPP, COMMISSIONER OF INDIAN AFFAIRS, AND WILLIAM A. PHILPOT, CONSTABLE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

LYDA B. CONLEY, APPELLANT,
v.
JAMES R. GARFIELD, SECRETARY OF THE INTERIOR, and Horace B. Durant, Thomas G. Walker, and William A. Simpson, Commissioners. } No. 77.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR APPELLEES.

STATEMENT.

By a treaty concluded in 1829 (7 Stat., 327; 2 Kappler's Ind. L. & T., 217) the Government agreed with the Delaware Indians—

> * * * that the country in the fork of the Kansas and Missouri rivers, extending up the Kansas River, to the Kansas line, and up the Missouri River to Camp Leavenworth, and thence by a line drawn westwardly, leaving a space ten miles wide, north of the Kansas boundary line, for an outlet; shall be conveyed

> and forever secured by the United States, to the said Delaware Nation, as their permanent residence: And the United States hereby pledges the faith of the Government to guarantee to the said Delaware Nation forever, the quiet and peaceable possession and undisturbed enjoyment of the same, against the claims and assaults of all and every other people whatever.

In 1843 the Delawares ceded their rights in a portion of this land to the Wyandotte *nation*. (9 Stat., 337; 2 Kappler's Ind. L. & T., 793.) The Wyandottes occupied the land so ceded until 1855, when it was decided that they were fit to abandon their tribal existence and be admitted to citizenship, and a treaty was accordingly concluded between them and this Government whereby they (the Wyandottes) did

> * * * cede and relinquish to the United States, all their right, title, and interest in and to the tract of country situate in the fork of the Missouri and Kansas Rivers, which was purchased by them of the Delaware Indians, by an agreement dated the fourteenth day of December, one thousand eight hundred and forty-three, and sanctioned by a joint resolution of Congress approved July twenty-fifth, one thousand eight hundred and forty-eight, *the object of which cession is*, that the said lands shall be subdivided, assigned, and reconveyed, by patent, in fee-simple, in the manner hereinafter provided for, to the individuals and members of the Wyandott Nation, in severalty; except as follows, viz: The portion now enclosed and used as a public

> burying-ground, shall be permanently reserved and appropriated for that purpose * * * (10 Stat., 1159; 2 Kappler's Ind. L. & T., 506.)

It will be observed that the first-mentioned treaty, with the Delawares, did not purport to grant anything but a possessory right, and hence that such right is all that passed to the Wyandotte tribe by the treaty of 1843. Accordingly, the cession to the United States by the treaty of 1855 was a mere relinquishment of this tribal right of possession in order to clear the way for the contemplated allotment of the land to the individual members of the tribe.

The Wyandottes quickly proved themselves incompetent to manage their own affairs. Most of them speedily sold their allotments and dissipated the proceeds of such sales and became wholly dependent upon governmental bounty for their support. Therefore, in 1867, a treaty was made, reciting the dependent condition of the Wyandottes and setting aside a tract of land in the Indian country (which was ceded to the Government for that purpose by another tribe of Indians in the same treaty) for the use of those members of the Wyandotte tribe who had not become citizens of the United States and such others as had become such citizens and might desire to resume tribal life. (15 Stat., 513; 2 Kappler's Ind. L. & T., 740.) Nearly all the Wyandottes who had become citizens availed themselves of this privilege and resumed tribal life (Rep. of Secy. of Interior to 41st Cong., 2d sess., pp. 475, 903) and have since continued it.

This being the situation Congress, in the Indian p[illegible] op[illegible]riation bill of 1906 (34 Stat., 325, 348), authorized the Secretary of the Interior to sell and convey the burial ground above mentioned and to remove the remains of those buried therein to the Wyandotte cemetery at Quindaro, Kans., and, after paying the expense of such removal, the cost of suitable monuments to those reinterred and the claims of certain Wyandotte Indians on a specified account, to distribute the proceeds of the sale ratably among the Wyandottes, parties to the treaty of 1855, or their heirs.

Appellant, who is a citizen of the United States, but of Wyandotte blood, objects to this sale on sentimental grounds (see allegation as to amount of money in controversy, R. 13), but seeks to base her right to object upon a supposed individual interest in the land vested in her by the treaty of 1855; and the sole question on the merits is as to the existence of this individual right. The case was dismissed by the court below, however, for want of jurisdiction; and although the appeal was general, bringing all questions here for review and consequently calling for a discussion of the merits, the jurisdictional objections appear fatal.

ARGUMENT.

I.

The lower court was without jurisdiction because the bill fails to show that the sum of two thousand dollars is involved.

The allegation of the amended bill is—

> * * * that although the value of the land itself is the sum of seventy-five thousand dollars ($75,000.00) or more, that by reason of the aggrieved and wounded feelings of said orator there can be no standard by which to estimate the value of said seizin, legal estate, and vested rights as heir and beneficiary. (Record, p. 13.)

This is all that appears in respect to the amount involved in the controversy. It is of course wholly insufficient to show that the jurisdictional amount is involved. That amount is two thousand dollars. As a suit of this nature must be maintained under section 1 of the act of August 13, 1888 (25 Stat., 433), prescribing the jurisdiction of the Circuit Courts of the United States, which provides that such courts shall have original cognizance "of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States. * * * or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid."

The act of February 6, 1901 (31 Stat., 760), authorizing suits by Indian allottees in respect to their allotments, of course has no application to any case that does not involve the right of a person of Indian blood or descent to an allotment of land under some law or treaty. The appellant asserts no such right here.

II.

The lower court was without jurisdiction because the suit is in reality against the United States.

Whether or not appellant has any interest in the land, the legal title to it is indisputably in the United States. The fee has always been in the United States. The Wyandottes never had more than a mere right of possession. Even that right of possession was relinquished by the treaty of 1855. Further, even if the Wyandottes had a fee, that fee came to the United States under the treaty of 1855. Hence the only legal title is now in the United States. On the other hand, appellees have no interest whatever in the land or in the controversy. Accordingly, as to jurisdiction the case is ruled by *Naganab* v. *Hitchcock* (202 U. S., 473). In that case, as in this, the suit was brought by a citizen of the United States of Indian descent, and was based upon the alleged right of himself and other members of his tribe, in behalf of whom he sued, to have certain lands which had been conveyed by his tribe to the United States under an act of Congress of January 14, 1889, administered for their benefit. The allegation was that Hitchcock, the Secretary of the Interior, claiming to act under a

statute passed June 27, 1902, was about to do acts which, if carried out, would deprive said Indians of their property without compensation and without due process of law. This court said:

> It is apparent from the above statement of the allegations of the bill that the defendant Hitchcock, Secretary of the Interior, has no interest in this controversy and that it is in effect a suit against the United States to control the disposition of the lands and for an account of the proceeds of the sales of certain lands conveyed by the Indians to the United States under the act of January 14, 1889. Without considering whether the courts would have power to control the action of the Secretary of the Interior in this matter, or whether the power and authority so to do is purely political and subject to the control of Congress without judicial intervention, as was held in the court of appeals, we are of opinion that there is no jurisdiction to entertain this case. In respect to this question it is on all fours with *State of Oregon* v. *Ethan Allen Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office*, decided on April 23 of this term (202 U. S., 60). That case was distinguished from *Minnesota* v. *Hitchcock* (185 U. S., 373), relied on here by the appellant, in the fact that in the *Minnesota* case the jurisdiction to sue the Secretary of the Interior was sustained because of the consent on the part of the United States to be sued in respect to school lands within an Indian reservation, and an acceptance by the Government of full responsibility for the

> result of the decision so far as the Indians were concerned (act of March 2, 1901, 31 Stat., 950). In this case, as in the *Oregon* case, the legal title to all the tracts of land in question is still in the Government, and the United States, the real party in interest herein, has not waived in any manner its immunity, or consented to be sued concerning the lands in question, and there is no act of Congress in anywise authorizing this action. Upon the authority of the *Oregon* case we hold that there is no jurisdiction to maintain the present suit, and the action of the court of appeals of the District of Columbia, affirming the decree of the Supreme Court of the District dismissing the complainant's bill, is affirmed.

The Oregon case referred to in the foregoing quotation (202 U. S., 60) was a suit to enjoin the Secretary of the Interior from allotting to individual Indians any part of the swamp lands situated within a described Indian reservation in the State of Oregon, because, as was alleged, the State had acquired title to such swamp lands by the swamp-land grant of March 12, 1860, although the Commissioner of the General Land Office, and on appeal the Secretary of the Interior, had rejected the State's claim to the land. The court, after showing by reference to the case of *Minnesota* v. *Hitchcock*, also referred to in the foregoing quotation, that the United States was the real party to the suit, said (p. 70):

> It is true in that case we sustained the jurisdiction of this court, but we did so by virtue of the act of March 2, 1901 (31 Stat.,

950), which was held to be a consent on the part of the United States to be sued in respect to school lands within an Indian reservation and an acceptance by the Government of full responsibility for the result of the decision, so far as the Indians, its wards, were concerned. But neither of the two facts deemed essential to the maintenance of that suit appear in this. There is no act of Congress waiving immunity of the United States or consenting that it be sued in respect to swamp lands, either within or without an Indian reservation, and there is no act of Congress assuming full responsibility in behalf of its wards, the Indians, for the result of any suit affecting their rights in these lands. It is unnecessary to repeat all that was said in that opinion in reference to these matters. It is sufficient to refer to it for a full discussion of the question.

Again, it must be noticed that the legal title to all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed. There has been no finding or adjudication by the Land Department that the lands referred to were swamp or overflowed on March 12, 1860. Under those circumstances it is not a province of the courts to interfere with the Land Department in its administration. So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration, and, until the legal title passes from the Government, inquiry as to equitable rights comes within the cognizance of the Land Department. Courts

> may not anticipate its action or take upon themselves the administration of the land grants of the United States. (*New Orleans* v. *Paine*, 147 U. S., 261, 266; *Michigan Land & Lumber Company* v. *Rust*, 168 U. S., 589, 591; *United States* v. *Thomas*, 151 U. S., 577; *Brown* v. *Hitchcock*, 173 U. S., 473; *Humbird* v. *Avery*, 195 U. S., 480, 502, 503.)

A like decision was made in the case of *Louisiana* v. *Garfield* (211 U. S., 70), where the State also claimed title to swamp lands, while the Secretary of the Interior asserted that the title to the lands had not passed out of the Government, because at the time the swamp-land act was passed a military reservation existed which included the lands within its area. As to this claim the court held that the question could only be determined in a suit to which the United States was a party and that, not having consented thereto, the United States could not be sued in respect to the stated lands.

The distinction is obvious between a case of this sort, which involves land the title to which is actually vested in the United States, and those cases in which suits have been upheld against public officers attempting mere administrative action under unconstitutional statutes. In the latter cases no rights of the sovereign were involved, because the alleged rights were dependent for their existence upon statutes which, being unconstitutional, were nullities.

III.

It was not the purpose of the treaty of 1855 in reserving this land as a public burying ground to create in appellant or other members of the former Wyandotte tribe individual rights, legal or equitable, in the land. The United States took the land free at any rate from more than a mere moral obligation, which the act of June 21, 1906, amply meets.

1. Before the treaty of 1855 individual Wyandottes had no private rights in the land. The treaty of 1843 with the Delawares ceded the land to the "Wyandotte Nation." Such cession vested no title in the individual members of the tribe.

Fleming v. *McCurtain*, No. 253, this term.

The individual Wyandottes therefore gave the United States nothing on the cession. They even had no private rights in the cemetery while the tribe endured. Why, then, should it be supposed that it was intended in the treaty of 1855 to give these individual Wyandottes private proprietary rights which they had never before had?

2. Further, the treaty contemplated, beside the dissolution of the tribe, that its former members should become citizens of the United States. Why should they be given private rights in the cemetery in their new status?

3. The agreement concerning the cemetery was made with the Wyandotte tribe in view of its going out of existence. It was therefore at most a moral pledge to the dissolving tribe. Rights are not to be inferred from the treaty in favor of persons not par-

ties to it and themselves neither advancing any consideration nor assuming any individual obligations.

4. The reservation of the cemetery is fully explained by several purposes:

(*a*) Without it there would have been nothing to take the cemetery out of the operation of the general plan of allotment of the ceded lands.

(*b*) By the cession the Indian title was extinguished and consequently a reservation was necessary to prevent the land from becoming subject to entry under the general homestead laws, which have always provided that lands to which the Indian title has been extinguished shall be subject to entry and settlement unless reserved by some treaty, law, or proclamation of the President. (See act of Sept. 4, 1841, 5 Stat., 455; Rev. Stat., secs. 2257–2258.)

(*c*) As has been already suggested, the reservation was a pledge to the extinguished tribe that the Government would take decent care of the bodies of the deceased members of the tribe. This pledge is recognized and fully met by the provisions of the act of 1906. By that act the Secretary of the Interior is authorized—

> to provide for the removal of the remains of persons interred in said burial ground and their reinterment in the Wyandotte Cemetery at Quindaro, Kansas, and to purchase and put in place appropriate monuments over the remains reinterred in the Quindaro Cemetery.

Further than that, the sale is made for the benefit of the Indians and not for the benefit of the United

States. The act of 1906 provides that after paying the expense incurred in carrying out the above-quoted provision and after paying certain specified claims the proceeds of the sale shall be distributed ratably among the former members of the Wyandotte tribe and their heirs. There is no room to claim any breach of faith on the part of the Government.

5. It would be most impractical to regard every former member of the Wyandotte tribe as having a private interest—necessarily permanent and transmissible to his heirs—in this old cemetery, for such a construction would result not only in present and ever increasing uncertainty as to the identity of the owners of these individual interests, but through that fact would prevent the abandonment of the cemetery under any conceivable circumstances. The practical importance of this view will be readily understood upon mere reference to the fact that although in 1869, when tribal existence was resumed by most of the Wyandottes, the surviving members of that race did not exceed 200 in number (Report of Secretary of Interior for 1869, supra), in 1909 their descendants in the Indian Territory numbered 373 (Report, Commr. of Ind. Affairs for 1909, p. 185), and upon momentary consideration of the ramifications and subdivisions of the title which would grow out of mixed marriages, past and future.

IV.

The United States had the full right to administer, and in the course of such administration to alter the use or application of the Indian tribal property, during the continuance of the tribal existence. It is not to be supposed that the treaty of 1855, in making the cemetery reservation, contemplated a surrender of this power of the United States over the land after the tribe had been dissolved.

That the United States had full power to administer the tribal lands of the Indians during the tribal existence can not be disputed. This court has always recognized that fact, and in *Lone Wolf* v. *Hitchcock* (187 U. S., 553) it explicitly held "that Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress," and that "full administrative power was possessed by Congress over Indian tribal property," and that in the exercise of such power Congress was beyond the reach of the courts even though treaty obligations were claimed to be violated. Where is the provision of the treaty of 1855 in any way limiting this preexisting full administrative power?

V.

The Wyandotte tribal authorities undoubtedly had power to terminate the use of this burial ground at its pleasure. By the cession the United States would have acquired like power, even if it had not possessed it already.

It can not be disputed that the tribal authorities could have terminated the use of this land as a burial

ground at any time, despite the objections of any individual members of the tribe. The title was in the tribe and its power (except as against the United States) was supreme. It can not readily be thought that under the treaty of 1855 the United States was to have less power over the land, as successor of the tribe in its management, than the tribe itself previously possessed.

LLOYD W. BOWERS,
Solicitor-General.

BARTON CORNEAU,
Special Assistant.

JANUARY, 1910.

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